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APPELLATE LAW UPDATE

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Supreme Court

Recent decision: evidence of reinsurance agreements not discoverable

In *Catholic Mut. Relief Soc. v. Superior Court* (Aug. 27, 2007, S134545) 42 Cal.4th 358, the plaintiffs sued the Roman Catholic Archdiocese of San Diego for alleged childhood abuse. They secured an order compelling discovery of reinsurance agreements covering the potential liability of the Archdiocese's primary liability insurer, the Catholic Mutual Relief Society. The plaintiffs contended the discovery was authorized by Code of Civil Procedure section 2017.210, and was necessary to facilitate settlement of the underlying tort action. Section 2017.210 allows litigants to secure pre-trial discovery of "the existence and contents of any agreement under which any insurance carrier may be liable to satisfy in whole or in part a judgment that may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment."

The Court of Appeal granted the insurer's petition for writ of mandate, holding the statute did not provide for discovery of reinsurance agreements or information concerning the non-party insurer's financial condition.

In a 4-3 decision, the Supreme Court affirmed the judgment of the Court of Appeal. The Supreme Court held section 2017.210 does not apply to reinsurance agreements, which are ordinarily not discoverable in a tort action against an insured defendant. The majority held the statute was ambiguous, and the Legislative history indicated that it authorized discovery only regarding the existence and terms of the primary liability policy potentially covering the defendant's tort liability and

whether the primary carrier contested coverage. The majority also explained that section 2017.210 does not authorize plaintiffs to discover "the assets of the insurance companies" providing primary liability insurance, including those companies' reinsurance and capital reserves. (42 Cal.4th at p. 373.)

Three justices dissented on the ground that, in their view, section 2017.210 was not ambiguous and was worded broadly enough to authorize discovery of reinsurance policies. However, the dissenting justices agreed that "section 2017.210 does not 'authorize broad discovery of the financial health of the liability insurer or its ability to meet its contractual obligations under its policies.'" (42 Cal.4th at p. 377.)

Review granted

The Supreme Court recently granted review in the following insurance law cases.

1. ***Ameron Intern. Corp. v. Insurance Co. of State of Pennsylvania*** (First Dist., Div. Five, May 15, 2007, A109755, A112856) 150 Cal.App.4th 1050, review granted Aug. 15, 2007 (No. S153852). The Court of Appeal's opinion in this case provided a useful overview of the current state of the law concerning CGL insurers' duties to defend and indemnify insureds in administrative (nonjudicial) proceedings. The court then applied the law to the language in various CGL primary and excess/umbrella policies to determine whether the trial court properly sustained various insurers' demurrers to causes of action for breach of contract and bad faith based on insurers' failure to defend or indemnify the insured in a protracted hearing before the U.S. Department of Interior Board of Contract Appeals.

The Supreme Court granted review to address the following issue: Does a proceeding before the United States Department of the Interior Board of Contract Appeals constitute a "suit" such as to trigger insurance coverage under a commercial general liability policy?

2. ***Delgado v. Interinsurance Exchange of Auto. Club of Southern California*** (Second Dist., Div. Three, June 25, 2007, B191272) 2007 WL 1810226, review granted Sept. 25, 2007 (No. S155129). The issue presented is: When a liability insurance policy provides bodily injury coverage for an "occurrence," defined as an "accident," does an insurer have a duty to defend a third-party complaint against its insured for assaulting the third party if the complaint alleges the insured was acting under an unreasonable belief in self-defense? The insurer's position is that the insured's unreasonable belief in the need for self-defense cannot transform deliberate conduct (hitting and kicking a third party) into a potentially covered "accident."

Coincidentally, the day after the Supreme Court granted review in *Delgado*, the Court of Appeal in Los Angeles published an opinion addressing the same issue. In *Jafari v. EMC Ins. Companies* (Second Dist., Div. Seven, Sept. 26, 2007, B192640) ___ Cal.App.4th ___ [2007 WL 2782365], the Court of Appeal held an insurer had a duty to defend its insured in an action alleging assault and battery by the insured's employee on the business premises. The insurer sought summary judgment, claiming the employee's actions allegedly taken in self-defense were nevertheless intentional and deliberate, and thus outside the policy's coverage for "accidents." The trial court granted the insurer's motion for summary judgment and dismissed the action. The Court of Appeal reversed, finding that "existing case law indicates acts committed by an insured in self-defense can be deemed an 'accident.'" (*Id.* at p. *1.) Accordingly, the assault and battery action "raised the possibility of coverage under the policy" and the trial court erred in finding the insurer had no duty to defend. (*Ibid.*)

Expect the Supreme Court to grant review in *Jafari* and either hold the case pending the decision in *Delgado* or make *Jafari* the lead case and put the briefing on hold in *Delgado*.

3. ***21st Century Ins. Co. v. Superior Court*** (Fourth Dist., Div. One, June 14, 2007, D049430) 2007 WL 1705663 [nonpub. opn.], review granted Sept. 25, 2007 (No. S154790). The Supreme Court granted review in this case and three other cases involving application of the "made whole" doctrine to an insurer's request that its

insured reimburse it for med pay benefits out of funds received from the tortfeasor.[1] The issue is how to account for the insured's attorney fees and costs in determining whether the insured has been "made whole." Here is how the Court of Appeal in one of the four cases framed and answered the question:

> An insurer that pays benefits to its insured under a first party policy is generally entitled to reimbursement from funds paid by the third party wrongdoer for the covered losses. One exception to this rule is the common law "made-whole" doctrine, which provides that an insurer is not entitled to these funds unless the insured has been made whole by the recovery from the tortfeasor and any other source. Whether an insured has been made whole is determined by comparing the insured's total damages resulting from the third party's tortious conduct with the total amount the insured recovered in compensation for those damages. The narrow issue presented in this writ proceeding is whether, in calculating the made-whole amount under no-fault medical payments insurance coverage, the insured's total recovery amount must be reduced by the insured's attorney fees and costs incurred to obtain the compensation from the third party tortfeasor. We conclude that under California law these expenses are not deducted when calculating the total recovery received by the insured.

(*Allstate Ins. Co. v. Superior Court*, *supra*, 60 Cal.Rptr.3d at pp. 784-785.)

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[1] The other three cases are *Allstate Ins. Co. v. Superior Court* (Fourth Dist., Div. One, June 14, 2007) 60 Cal.Rptr.3d 782, review granted Sept. 25, 2007 (No. S154815); *Interinsurance Exchange v. Superior Court* (Fourth Dist., Div. One, June 14, 2007, D049831) [nonpub. opn.], review granted Sept. 25, 2007 (No. S154822); and *Wawanesa General Ins. Co. v. Superior Court* (Fourth Dist., Div. One, June 14, 2007, D049675) [nonpub. opn.], review granted Sept. 25, 2007 (No. S154781). The Supreme Court deferred briefing in these three cases pending the decision in the lead case, *21st Century*.

Courts of Appeal

In addition to the *Jafari* case, discussed at page 3 above, the Courts of Appeal have recently issued the following insurance law decisions of interest:

Uninsured motorist coverage

California Capital Ins. Co. v. Nielsen (Third Dist., July 31, 2007, C053355) 153 Cal.App.4th 1221 [where vehicle driver's liability to passenger was covered by driver's mother's personal liability umbrella policy, vehicle was not an "uninsured motor vehicle" and thus passenger was not entitled to UM benefits under his own auto policy; fact that driver was uninsured and that no *auto* policy covered the vehicle did not make vehicle "uninsured"].

Choice of law governing policy interpretation

Frontier Oil Corp. v. RLI Ins. Co. (Second Dist., Div. Three, Aug. 6, 2007, opn. mod. Sept. 5, 2007, B189158) 153 Cal.App.4th 1436 [Civil Code section 1646 requires that contract be interpreted according to the law and usage of the place where it is to be performed if it "'indicate[s] a place of performance'" (*id*. at p. 1443), otherwise under the law and usage of place where it is made; under section 1646, when the terms or circumstances surrounding making of a liability policy reflect that the parties intended to insure a risk at a specified location, the policy must be interpreted according to the law and usage at that location; thus, California law governed interpretation of insurance contract entered into in Texas and covering liability arising from oil and gas operation in California; under California law, insurer had duty to defend insured against action alleging liability potentially covered under policy's pollution liability endorsement, even though endorsement itself did not mention duty to defend].

Insurer liability under Consumer Legal Remedies Act

Fairbanks v. Superior Court (Second Dist., Div. Three, Aug. 22, 2007) 154 Cal.App.4th 435. [insurer not subject to suit for violation of the Consumer Legal Remedies Act (Civ. Code, § 1750 et seq.), which regulates any "'transaction intended

to result or which results in the sale or lease of goods or services to any consumer'" (*id*. at p. 440), because insurance is not a "good" or a "service" within the meaning of the Act; court relies on statutory language, case law suggesting insurance is not a "service" within the meaning of the Act, Legislature's apparently deliberate omission of insurance from definition of "services" where model act on which Act was based included insurance in definition of "services," and already existing comprehensive scheme for regulating insurance under Unfair Insurance Practices Act (Ins. Code, § 790.03), under which private rights of action are not available].

Breach of implied covenant to accept reasonable settlement offer within policy limits

Archdale v. American Intern. Specialty Lines Ins. Co. (Second Dist., Div. Three, Aug. 22, 2007, B188432) 154 Cal.App.4th 449 [cause of action for bad faith based on insurer's failure to accept a reasonable settlement offer within policy limits accrues on entry of judgment against insured exceeding policy limits, and limitations period is tolled pending appeal from that judgment; cause of action for bad faith based on insurer's failure to accept a reasonable settlement offer within policy limits sounds in contract or tort, and amount of excess judgment can be recovered as contract damages under Civil Code section 3300 because such damages are reasonably foreseeable at the time of contracting; where plaintiff seeks contract damages for breach of insurer's implied duty to accept reasonable settlement offer within policy limits, four-year statute of limitations applies, where plaintiff seeks tort damages for such breach, two-year statute of limitations applies; where insurer refuses settlement offer on the ground its policy affords no coverage and its coverage position is later vindicated, insurer will have no liability for damages flowing from such refusal].